99-986

99-474

Supreme Court, U.S.
FILED
FEB 9 2000

In the Supreme Court of the United States

DANIEL M. BYRD,

PETITIONER,

*V.*

ENVIRONMENTAL PROTECTION AGENCY

*RESPONDENT.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

# BRIEF *AMICUS CURIAE* OF PATRICIA A. BUFFLER, ERNEST L. DAMAN, SHELDON LEE GLASHOW, MICHAEL GOUGH, JOHN D. GRAHAM, NATHAN R. HURT, DANIEL M. KAMMEN, A. ALAN MOGHISSI, RODNEY NICHOLS, FREDERICK SEITZ, CHARLES O. VELSY, ELIZABETH M. WHELAN, JAMES D. WILSON, AND RICHARD WILSON IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN*
* *Counsel of Record*
Edwin L. Lewis

Atlantic Legal Foundation
205 East 42nd Street, 9th Floor
New York, NY 10017
(212) 573-1960

*Counsel for Amici Curiae*

## TABLE OF CONTENTS

Table of Contents ..... i

Table of Authorities ..... ii

Interest of *Amici* ..... 1

Statement of the Case ..... 2

ARGUMENT ..... 6

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS THREATENS THE INTEGRITY OF THE PEER REVIEW AND THE REGULATORY PROCESS ..... 6

I. SCIENCE IS INCREASINGLY AN IMPORTANT FACTOR IN FORMULATING PUBLIC POLICY ..... 6

II. INDEPENDENT PEER REVIEW IS VITAL FOR ENSURING THAT REGULATORY REGIMES ARE BASED ON VALID SCIENCE AND ARE NOT ARBITRARY AND CAPRICIOUS ..... 8

III. THE DECISION OF THE COURT OF APPEALS THREATENS THE INDEPENDENCE OF SCIENTIFIC PEER REVIEW ..... 9

IV. THE "CONTRACTOR EXEMPTION" IS INCONSISTENT WITH FACA ..... 11

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

*page*

**Cases**

*Animal Legal Defense Fund v. Shalala*, 104 F.3d 424 (D.C. Cir. 1997) ..... 13 fn. 10

*Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir.1993) ..... 14

*Byrd v. EPA*, 174 F.3d 239, 241 (D.C. Cir. 1999) ... *passim*

*Cargill, Inc. v. U.S.*, 173 F.3d 323 (5th Cir. 1999) ... 11, 14

*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) ..... 8

*Food Chem. News v. Young*, 900 F.2d 328 (D.C. Cir. 1990) ..... 5, 13 fn. 10

*Kumho Tire Co. v. Carmichael*, ___ U.S. ___, 119 S.Ct. 1167 (1999) ..... 8

*Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) ..... 3, 5, 11, 13 fn. 10

**Statutes**

Clean Air Act, 42 U.S.C. §§740l-7671q ..... 3

1990 Clean Air Act Amendments, 42 U.S.C. §7412(b)(2) and 42 U.S.C. §7412(d) ... 3 fn. 4

Federal Advisory Committee Act, 5 U.S.C. App. II §§1-15 ..... *passim*

*page*

Federal Advisory Committee Act Amendments,
Pub. L. 105-153 (Dec. 17, 1997) . . . . . 12

**Regulations**

41 C.F.R. § 101-6.1007(b)(2)(iii) (1997) . . . . . 12 fn. 8

"Carcinogenic Effects of Benzene: An Update,"
62 Fed. Reg. 35172-35173 (June 30, 1997) . . . . . 4, 15

**Miscellaneous**

Stephen G. Breyer, *The Interdependence of Science and Law*, Science 280:537 (April 24, 1998) . . . 6-7

Byrd Declaration, ¶¶ 22-13
(Pet. App. Section C at C-12-C-13) . . . . . 10 fn. 6

EPA, "ORD. Standard Operating Procedures for Peer Review of Sci. or Techn. Work Products." (Sept. 30, 1994) 7

EPA, Office of Res. & Dev., Carcinogenic Effects of Benzene: An Update, (EPA/600/P-97/001F, April 1998) . 5

EPA, Office of Science Policy, Office of Research and Development, Science Policy Handbook, Peer Review, EPA 100-B-98-001 (Jan. 1998) . . . 9, 10-11

Statement of Sen. Metcalf, 118 Cong. Rec. S14647 (Sept. 12, 1972), reprinted in McMurtry, V., Fed. Advisory Comm. Act (Pub. L. 92-463), Source Book: Legislative History, Texts, and Other Documents at 158 (Cong. Res. Serv. 1978) . . . . . 3

Statement of Rep. Waxman in support of H.R. 2977, 1997 Cong. Rec. at H10581 (Nov. 9, 1997) . . . . . 12 fn. 9

## INTEREST OF AMICI

*Amici*[1] are scientists, scholars and teachers of science, public health and public policy and consultants. *Amici* include a Nobel Laureate in physics, the president emeritus of one of the most prestigious research universities in the world, the chief executive officer of one of this nation's oldest and most prestigious scientific societies, former presidents or chairpersons of important learned societies in fields of science and technology, former government officials (some of whom worked in senior science positions for the Environmental Protection Agency or for Congress). The fields of expertise of *amici* include chemistry, physics, risk analysis, toxicology, epidemiology and engineering (including, of particular relevance to this case, environmental sciences); many of them have earned doctorates in various fields of science. Many are or have been editors and contributors to scientific and other scholarly journals, and are authors of authoritative works in their respective areas of expertise. Some are professors at highly regarded institutions of higher education in the United States[2]. They hold many other distinctions for achievements in fields of science and academia. *Amici* are authors of numerous articles, studies, monographs and textbooks. Many are

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

Counsel for the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

[2] *Amici* appear in their individual capacities, and not as representatives of the organizations or institutions with which they are affiliated.

frequently called upon to serve on official commissions, review boards, advisory committees and institute[3].

*Amici* express no view as to the appropriateness of EPA's benzene regulations. *Amici* appear solely to inform the Court of their views as to the importance of peer review in evaluating scientific data, theories and conclusions, and the importance of science and peer review in the formulation of public policy as embodied in legislation or regulations.

## STATEMENT OF THE CASE

*Amici* will not burden the Court with a detailed recitation of the relevant statutory provisions and the factual background of this case (for that they adopt the narrative contained in the Petition herein), but will merely highlight the most significant elements of each.

### A. The Statute

The Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"), provides that "'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group. . . which is. . . established or utilized. . . by one or more agencies, in the interest of obtaining advice or recommendations. . . ." FACA § 3. FACA applies to "each" advisory committee. FACA § 4. FACA's requirements include opening each advisory committee meeting to the public and allowing attendance by interested persons, and making available for public scrutiny the records, reports, drafts, and studies made available to each advisory committee. FACA § 10(a) & (b).

---

[3]. The qualifications of *amici*, the positions they hold and have held, and the scholarly honors and distinctions they have earned are set forth in the biographical appendix to this brief.

A major purpose of FACA is to ensure "disclosure and objective counsel," so that the public will know what advice the Government is getting and how they might add "to the information process." Statement of Sen. Metcalf (floor manager), 118 Cong. Rec. S14647 (Sept. 12, 1972), reprinted in McMurtry, V., Fed. Advisory Comm. Act (Pub. L. 92-463), Source Book: Legislative History, Texts, and Other Documents at 158 (Cong. Res. Serv. 1978). *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989).

**B. The Regulatory Background**

Benzene is a chemical manufactured in high volume and is widely used as a component of gasoline and in a wide range of industrial processes and specialty chemicals. Benzene can cause acute myelocytic leukemia in humans, and EPA has regulated it as a hazardous air pollutant under the Clean Air Act, 42 U.S.C. §§7401-7671q, because of its carcinogenic effect.

The initial risk assessment[4] for benzene, drafted by EPA's Office of Research and Development ("ORD") was peer reviewed by EPA's Science Advisory Board, which operates under FACA guidelines. ORD subsequently updated the benzene risk assessment, but did not subject the update to scientific peer review, although EPA used the updated benzene

---

[4] The 1990 Clean Air Act Amendments require EPA to promulgate emissions standards for major sources and source categories of designated hazardous air pollutants ("HAPs"), including benzene. 42 U.S.C. §7412(d). EPA is required to consider the risks posed by exposures to particular HAPs in setting standards for HAP emissions. *See, e.g.*, 42 U.S.C. §7412(b)(2). A risk assessment employs statistical methods to analyze the findings of scientific studies on the effects of exposure of humans or animals to chemical substances in order to extrapolate from such data to a numerical estimate of the risk of occurrence of symptoms in humans from defined exposure doses.

risk assessment as the basis for additional Clean Air Act regulations.

### C. The Benzene Advisory Committee

In 1992 EPA's Office of Mobile Sources asked ORD to provide another update of the human carcinogenic risks of inhaled benzene. In 1997 a Federal Register notice announced a peer review workshop scheduled for July 16, 1998 and public review of ORD's draft update. "Carcinogenic Effects of Benzene: An Update." The Federal Register notice also stated that Eastern Research Group ("ERG"), an EPA contractor, would provide logistical support for the peer review workshop, and that after the workshop, EPA would "consider the peer-panel and public comments before preparing a final report for the Office of Mobile Sources." 62 Fed. Reg. 35172-35173 (June 30, 1997).

### D. The Role of EPA's Contractor

Under EPA's Statement of Work, ERG was, among other tasks (many of them purely ministerial), to select committee members from a list provided by EPA and from its own list and submit its choices for EPA approval, designate the panel chairperson in "consultation with EPA" and draft and send a summary report of the committee meeting to EPA prior to finalizing the report. *See Byrd v. EPA*, 174 F.3d 239, 241 (D.C. Cir. 1999) (hereafter "*Byrd*"). EPA reserved the authority to approve or disapprove ERG's proposed choices of committee members and the committee chair. *See Byrd* at 241, 247.

EPA did, in fact, provide ERG with a list of "acceptable" panel members, and four of the six members of the panel came from this list. *Byrd* at 241. "EPA held a teleconference with ERG and the selected panelists, during which the panelists were instructed to prepare pre-meeting comments on the draft Benzene Update 'specifically addressing a series of questions that [EPA] had provided to ERG. The panelists circulated

their pre-meeting notes among themselves and provided a copy to EPA." All of this occurred before EPA provided any public notice of the formation of the Benzene panel. *Id.* at 241.

The report of the public meeting, with committee member comments, was finalized and was adopted by EPA. *See* EPA, Office of Res. & Dev., Carcinogenic Effects of Benzene: An Update, at v, (EPA/600/P-97/001F, April 1998) (final document).

### E. The Court of Appeals Decision

The majority in the Court of Appeals for the District of Columbia held that EPA had not "established" or "utilized' the benzene advisory committee for FACA purposes. *Byrd v. EPA*, 174 F.3d at 245. It cited *Public Citizen v. Dept. of Justice*, 491 U.S. 440 (1989), for the proposition that "an advisory panel is 'established' by an agency only if it is actually formed by the agency. . . .' , 174 F.3d at 245. The D. C. Circuit also stated that the analysis of whether an advisory committee has been "established" does not turn on who determines the methodology and operation of the committee, and concluded that ERG, not EPA, had established the committee. *Id.* at 246-247. Although the panel majority recognized that "the contract between ERG and EPA afforded EPA significant potential authority in the panel selection process," 174 F.3d at 247, it held that because EPA had not fully exercised the authority it had reserved over the benzene committee's activities and because there was "no reason to assume that the threat of an EPA veto affected ERG's panel selections," it had not shown that EPA had "established" the benzene committee. *Id.*

The Court of Appeals majority also held, based on what it characterized as the Supreme Court's "narrow" interpretation of the term "utilized" in *Public Citizen*, *supra*, that while "'utilized' encompasses a group organized by a nongovernmental entity, this is so only where the group is "nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by

agency officials.'" *Id.* at 246 (citing *Food Chem. News v. Young*, 900 F.2d 328 at 332-333 (D.C. Cir. 1990)). It held that EPA's involvement in the benzene committee did not constitute the requisite strict management. *Id.*[5]

## ARGUMENT

### A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS THREATENS THE INTEGRITY OF THE PEER REVIEW AND THE REGULATORY PROCESS

### I. SCIENCE IS INCREASINGLY AN IMPORTANT FACTOR IN FORMULATING PUBLIC POLICY

In a recent speech to the American Association for the Advancement of Science and in a follow-up article in the journal *Science*, Justice Breyer noted

> As society becomes more dependent for its well-being upon scientifically complex technology, we find that this technology increasingly underlies legal issues of importance to all of us.
>
> ****

---

[5] The Court of Appeals noted that "If the benzene panel was in fact an "advisory committee" subject to FACA as defined by 5 U.S.C.App. Ii § 3(2), both parties agree that the panel functioned in violation of FACA. Among other things, 'the records, ... working papers ... or other documents which were made available to ... each advisory committee shall be available for public inspection and copying,' FACA, 5 U.S.C.App. II § 10(b), and '[d]etailed minutes of each meeting of each advisory committee shall be kept.' Id. § 10(c). *Byrd* at 242.

> The importance of scientific accuracy in the decision of such cases reaches well beyond the case itself. A decision wrongly denying compensation in a toxic substance case, for example, can deprive not only the plaintiff of warranted compensation but can discourage other similarly situated individuals from even trying to obtain compensation and can encourage the continued use of a dangerous substance. . . .The upshot is that we must search for law that reflects an understanding of the relevant underlying science, not for law that frees companies to cause serious harm or forces them unnecessarily to abandon the thousands of artificial substances on which modern life depends.

Stephen G. Breyer, *The Interdependence of Science and Law*, Science 280:537 (April 24, 1998).

*Amici* submit that understanding and application of the relevant underlying science is as important in the formulation of regulatory regimes, which often have a significantly broader impact than a particular case or even a series of litigations.

Of particular relevance to this case, EPA itself deemed the benzene assessment its Category I, EPA's highest category for determining the level of appropriate peer review, a category that includes "Major Scientific or Technical Work Products." *See Byrd* 174 F.3d 239, 244. EPA reserves Category I for "regulatory/technical products" of the kind that support "major regulatory decisions or policy/guidance of major impact," and that "establish a significant precedent, model, or methodology . . . or address controversial issues. *See* EPA, "ORD. Standard Operating Procedures for Peer Review of Sci. or Techn. Work Products". (Sept. 30, 1994) at 8. J.A. 125.

## II. INDEPENDENT PEER REVIEW IS VITAL FOR ENSURING THAT REGULATORY REGIMES ARE BASED ON VALID SCIENCE AND ARE NOT ARBITRARY AND CAPRICIOUS

Peer review, while not guaranteeing that particular methods of scientific theories, data or conclusions are accurate, are vital means of permitting the scientific community to examine the data, to understand them, to test them, to evaluate the investigator's methods and findings, and to show either that the data or methods of a particular scientist are correct and appropriate and lead to valid conclusions or that they are not correct and thus do not lead to valid conclusions.

The importance of peer review in ensuring the integrity and validity of scientific and technical data and findings was recognized by this Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593-594 (1993):

> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. . . . [S]ubmission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, Reliable Knowledge: An Exploration of the Grounds for Belief in Science 130- 133 (1978); Relman and Angell, How Good Is Peer Review?, 321 New Eng.J.Med. 827 (1989). The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

*See also Kumho Tire Co. v. Carmichael*, ___ U.S. ___, 119 S.Ct. 1167, at 1175-76 (1999).

The EPA itself has recognized the importance of independent and objective peer review of scientific or technical judgments. In its *Science Policy Council Handbook Peer Review*, EPA described the peer review process in the following words:

> 1.2.1 Why use Peer Review?
>
> Peer review is intended to uncover technical problems or unresolved issues in a preliminary (or draft) work product through use of independent experts. This information is then used to revise that draft product so that the final work product will reflect sound technical information and analyses. Peer review is a process for enhancing a scientific or technical work product so that the decision or position taken by the Agency, based on that product, has a sound, credible basis.

EPA, Office of Science Policy, Office of Research and Development, Science Policy Handbook, Peer Review, EPA 100-B-98-001 (Jan. 1998) (available at http:// www. epa . gov/ ordntmt/ORD/spc/perevmem.htm (emphasis in original).

## III. THE DECISION OF THE COURT OF APPEALS THREATENS THE INDEPENDENCE OF SCIENTIFIC PEER REVIEW.

The decision of the Court of Appeals threatens a public interest which is perhaps even more far-reaching than the emasculation of FACA. The advisory committee at issue here was a peer review panel. Peer review is the crucial, independent validator of important scientific judgments.

Contractors often depend on agencies for their economic survival. Some scientists are influenced by the potential for receiving grant money from the government. If an agency uses its power of veto or the more subtle "power of suggestion" over

the contractor to effectively exclude from peer review panels scientists whom the agency apprehends will be "too independent," then the process and purpose of peer review is distorted. This is exacerbated if scientists who are not on the peer review panel are prevented from obtaining data and other information about the panel's work so that they may critique it free from the influence of the agency or the agency's agent, the contractor[6].

The specific event that triggered this case is the withholding from Dr. Byrd of data that was important or necessary to enable him, as a knowledgeable and interested member of the public, from fully and intelligently commenting on the work of the benzene peer review panel. Data are the lifeblood of science, and without full access to data scientific judgments cannot be properly scrutinized. Indeed, it can be said that full disclosure of data is the *sine qua non* of peer review[7].

Without access to all available information, the interested public, and particularly outside experts such as Dr. Byrd, are prevented from "uncover[ing] technical problems or unresolved issues" and ensuring "that the final work product will reflect sound technical information and analyses." EPA, Office of Science Policy, Office of Research and Development, Science

---

[6] In this case, EPA's close supervision of committee membership selection resulted in inclusion of a scientist whose earlier contract work for EPA on the health effects of benzene was included in the very documentation that was under review by the committee. Byrd Declaration, ¶¶ 22-13. (Pet. App. Section C at C-12-C-13).

[7] While peer review in the EPA regulatory process has a somewhat different purpose than peer review for publication, we believe that the differences are not material or substantial. For purposes of assuring that EPA's practices and regulatory decisions are grounded in good data and valid analytical methods, independent peer review, and public access to the data and to the peer review panel's process are necessary.

Policy Handbook -- Peer Review, EPA 100-B-98-001 (Jan. 1998)

## IV. THE "CONTRACTOR EXEMPTION" IS INCONSISTENT WITH FACA'S PURPOSE.

Without any basis in the statutory language and purpose of FACA, the Court of Appeals created an exemption that is readily invoked by federal regulatory agencies and provides a simple way for them to evade FACA. FACA contains no such exemption, nor does its legislative history (*see* Judge Williams, dissenting in part: ""it seems to me inconsistent with the statute's language and intent to exempt from FACA a panel controlled so closely in membership and purpose." *Byrd v. EPA*, 174 F.2d at 249) or rulings of this Court. Under the broad holding of the Court of Appeals in this case, an agency that seeks advisory committee advice need only hire a contractor to perform essentially ministerial functions, while retaining effective control over the membership, direction and substantive work of the committee. This would enable the agency to avoid responsibilities of accountability to Congress and openness to the public.

The principal purpose of FACA is to ensure that ". . . the Congress and the public . . . be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees." 5 U.S.C.App. 2 § 2(b)(5). In *Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 453 (1989) this Court noted that public and congressional scrutiny is intended to further FACA's overall objective of avoiding the "expenditure of public funds for worthless committee meetings and biased proposals." (emphasis added). *See also Cargill, Inc. v. U.S.*, 173 F.3d 323, 329 (5th Cir. 1999) ("FACA is designed to ensure that advisory committees are fairly constituted and properly monitored so that they will provide sound advice."). This purpose is implemented by requirements in the statute and

implementing regulations that are intended to ensure that advisory committees are objective[8].

The 1997 Federal Advisory Committee Act Amendments, Pub. L. 105-153 (Dec. 17, 1997) strengthened FACA's openness requirements, and closed a "loophole," by providing, *inter alia*, that agencies may not use the advice or recommendations of the National Academy of Sciences unless specific FACA procedural requirements (including public notice of meetings and publication of summaries of meetings that are closed) are met. The 1997 amendments reiterate that FACA's purpose is to safeguard "the public's right to know about the advisors and procedures used to produce technical or policy advice for the government."[9] This recent amendment of FACA indicates that the broad exemption to FACA found by the Court of Appeals is contrary to Congress' intent. Indeed, the FACA Amendments of 1997, prohibiting agency use of National Academy of Sciences committees without compliance with

---

[8] FACA § 5(b)(2) states that each advisory committee must have membership that is "fairly balanced in terms of the points of view represented." 5 U.S.C.App. 2 § 5(b)(2). The regulations implementing FACA require that the agency overseeing an advisory committee have a "plan" to ensure "fairly balanced membership" and to ensure that "the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee." *See* 41 C.F.R. § 101-6.1007(b)(2)(iii) (1997).

Section 5(b)(3) of FACA requires federal agencies to make "appropriate provision[ ] to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment." 5 U.S.C.App. 2 § 5(b)(3).

[9] Statement of Rep. Henry W. Waxman in support of H.R. 2977, 1997 Cong. Rec. at H10581 (Nov. 9, 1997).

openness requirements, reflects concern over agency use of the National Academy to evade FACA[10].

Under these amendments, an agency can no longer avoid FACA's mandatory requirements designed to ensure openness, accountability and objectivity by utilizing an advisory committee formed by the National Academy of Sciences, whose reputation for scholarship is well-established, but under the Court of Appeals' decision it can evade those requirements by hiring a far less august, prestigious, reputable and independent contractor to organize the advisory panel. This result is absurd, and renders nugatory the central objective of FACA[11].

---

[10] By adopting the 1997 amendments, Congress confirmed the D.C. Circuit's holding in *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424 (D.C. Cir. 1997), in which Judge Silberman, writing for a unanimous court, held that the National Academy of Sciences was subject to FACA. In that opinion, Judge Silberman pointed out the narrowness and somewhat contorted reasoning of *Public Citizen*. We submit that *Public Citizen* can be distinguished, because there the ABA Committee accepted no public funds, whereas here ERG clearly did accept public funds, and was really nothing more than a conduit for EPA's funding of the benzene advisory committee. *See Animal Legal; Defense Fund*, 104 F.3d at 428.

The court in *Animal Legal Defense Fund* also explained quite clearly why *Food Chemical News v. Young*, 900 F.2d 328 (D.C. Cir. 1990), on which the Court of Appeals in this case relied so heavily, is inapposite: in *Food Chemical News* the committee was formed by a wholly private scholarly organization and "was not amenable to [any] management by [FDA] officials," quoting *Food Chemical News*, 900 F.2d at 333, which in turn was quoting *Public Citizen*, 491 U.S. at 457-458.

[11] The American Society of Mechanical Engineers, for example, assists government agencies in conducting peer reviews; but when ASME administers advisory committees, it requires complete independence, and refuses assignments where the agency seeks to control or guide the society's advisory panel. Similarly, one of the *amici* is chief executive of a non-profit institute that acts as a

The Court of Appeals in this case recognized that EPA's use of contractors to convene advisory committees was a continuing practice. 174 F.3d at 244 n.4.; *id.* at 248, yet it created an exemption that creates a simple and obvious way to circumvent FACA. As the Fifth Circuit noted in *Cargill, Inc. v. U.S., supra*, at 341 "If FACA has no teeth, the work product of spuriously formed advisory groups may obtain political legitimacy that it does not deserve. *See also Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir.1993). It is for this reason that *amici* believe that this Court should grant the petition and that the Court of Appeals decision in this case should be reversed.

The Court of Appeals' holding that EPA had not "established" the benzene advisory committee relied largely on the majority's theoretical distinction between possession of veto power and actual use of that power. We believe that this is, in the realities of government process, a false distinction. The majority itself stated that EPA had reserved "significant potential authority" over the contractor's selection of committee members, and stated that "[t]he result in this case might have been different if EPA had exercised its [veto] authority . . ." it concluded that "there is no reason to assume that the threat of an EPA veto affected ERG's panel selections." *Byrd*, 174 F.3d at 247. This, we submit is naive.

---

government contractor for the purpose of providing credible peer review of agency sponsored projects; the institute contracts with ASME to set up the panel to advise the institute. The institute solely determined to use ASME, and the government agency does not participate at all in the selection of members of the peer review panel, nor does it have any power, not even residual power, to influence the panel's work. Thus, unlike the advisory committee in this case, the ASME panels comply strictly with the criteria set down in *Food Chemical News*. The ASME panels' process is open, and they operate under procedures equivalent to the FACA mandates the National Academy of Science must follow under the 1997 Amendments.

Judge Williams' dissent pointed out the weakness of this reasoning, noting that

> The veto power is key. That it was not used in the benzene episode does not much help EPA: not only may EPA exercise it in future applications of the policy, but the contractor was and is quite likely to take the fact of veto power into account in its selection decisions. Assuming that contractors will ignore this fact--as the majority appears to do--seems akin to believing that the President takes no account of senators' opinions when he nominates federal judges.

174 F.3d at 249 (citation omitted).

Judge Williams' analogy of the potential of an agency's veto power over appointments to peer review panels to presidential judicial nominations actually exaggerates a contractor's independence, because unlike the President, who is co-equal with the Senate, with powers that can be used as leverage over individual Senators and the body itself, the contractor is in a completely subordinate position vis-a-vis the agency because a contractor like ERG often depends for its lifeblood -- government contract revenues -- on the goodwill of the contracting agency.

EPA in fact involved itself in the contractor's choice of committee members and the committee chair; in drafting of the committee's meeting agenda; and in conveying the charge to the committee. EPA publicly described the benzene peer review committee as an EPA committee, and the contractor's role as merely providing logistical support. 62 Fed. Reg. at 35173; *see Byrd*, 174 F.3d at 249 (Williams, J., dissenting)

## CONCLUSION

Because this case presents an issue of great public importance, *amici* support Petitioner's request that the Court grant the petition for a writ of certiorari.

Dated: February 9, 2000

Respectfully submitted,

MARTIN S. KAUFMAN,
Counsel of Record

ATLANTIC LEGAL FOUNDATION
205 East 42nd Street - 9th Floor
New York, New York 10017
(212) 573-1960

Counsel for *Amici Curiae*

## BIOGRAPHICAL APPENDIX

**PATRICIA A. BUFFLER** is Professor of Epidemiology at and formerly Dean of the School of Public Health of the University of California at Berkeley. Dr. Buffler is a Fellow of the American College of Epidemiology, and was President of that organization in 1991-1992. She is a member of the Institute of Medicine of the National Academy of Sciences and a Fellow of the American Association for the Advancement of Science.

**ERNEST L. DAMAN** is Chairman Emeritus of Foster Wheeler Development Corporation and was previously Chairman of the Board of Foster Wheeler Development Corporation and before that was Director of Research of that company. He is a Past President of American Society of Mechanical Engineers. Mr. Daman is a member of the National Academy of Engineering, a member of the American Association for the Advancement of Science and Past Chairman of the American Association of Engineering Societies and a Fellow of the Institute of Energy (England). He is the author of numerous papers, and holds 18 patents. He was responsible for the design and development of a combined steam gas turbine plant, fluidized bed combustion, fast breeder reactor components, supercritical steam generators, environmental control processes, and advanced high-efficiency power generation systems.

**SHELDON LEE GLASHOW** is a Nobel Laureate in Physics and Mellon Professor of Physics at Harvard University.

**MICHAEL GOUGH** is a consultant in risk analysis, epidemiology and toxicology. He was the Director of Science and Risk Studies at the CATO Institute in Washington, DC. He also served as the Manager of the Biological and Behavioral Sciences Program in the Office of Technology Assessment, U.S. Congress. Dr. Gough earned a Ph.D. in Biology from Brown University. He has taught microbiology at Baylor College of Medicine and at the State University of New York.

**JOHN D. GRAHAM** is Director of the Center for Risk Analysis of the Harvard University School of Public Health and Professor of Public Policy and Decision Sciences in the Department of Health Policy and Management at the Harvard University School of Public Health. He was previously Director of the Center for Injury Control at the Harvard University School of Public Health. He is the author or co-author of over 100 published articles and papers on risk analysis, product safety and public health. He has been a member of the Highway Safety Study of the Strategic Transportation Research Committee of the Transportation Research Board of the National Research Council. He was a member of the NHSTA Motor Vehicle Safety Research Advisory Committee of the U.S. Department of Transportation. In 1991 he was elected president of the Society for Risk Analysis.

**NATHAN R. HURT** is a recent Past President of the American Society of Mechanical Engineers. He is vice president of IDM Environmental Corp. Previously, he worked for Los Alamos Technical Associates and the Goodyear Tire and Rubber Company. He was president of the Goodyear Atomic Corporation, a subsidiary of Goodyear Tire. He is a mechanical engineer with 50 years of experience in the chemical and nuclear industries. His chemical industry experience includes design, construction and plant management -- primarily in vinyl monomers and copolymers, synthetic rubbers and resins, and polyesters. His nuclear industry experience consists of project management, facilities management, and marketing in uranium enrichment and weapons plants.

**DANIEL M. KAMMEN** is an environmental physicist and researcher. He is Professor of Energy Policy at the University of California at Berkeley. Previously he was Assistant Professor of Public and International Affairs at Princeton University. He is the author or contributor to over 40 articles on renewable energy, technology policy and economic development.

**A. ALAN MOGHISSI** is President of the Institute for Regulatory Science, a non-profit organization dedicated to the idea that societal decisions must be based on the best available scientific information. The activities of the Institute include research, scientific assessment, and science education at all levels. Dr. Moghissi held positions at the U.S. Public Health Service and the U.S. Environmental Protection Agency (EPA). He served in a number of capacities at EPA, including Director of the Bioenvironmental/Radiological Research Division, Principal Science Advisor for Radiation and Hazardous Materials and Manager of the Health and Environmental Risk Analysis Program. After his retirement from the EPA, Dr. Moghissi joined the University of Maryland at Baltimore as Assistant Vice President for Environmental Health and Safety; subsequently he was Associate Vice President for Environmental Health and Safety at Temple University in Philadelphia, Pennsylvania. Dr. Moghissi's research has included measurement of pollutants and the biological effects of environmental agents. He is the editor-in-chief of *Environment International* and of *Technology: Journal of The Franklin Institute,* which is one of America's oldest continuously published journals of science and technology. Dr. Moghissi is chairman of the Environmental Division of the American Society of Mechanical Engineers.

**RODNEY NICHOLS** is President and chief executive officer of the New York Academy of Sciences. He has been a member of the Executive Committee of the Carnegie Commission on Science, Technology and Government and was the principal author of the Commission's report "Science and Technology in U.S. International Affairs" (1992).

**FREDERICK SEITZ** is President Emeritus of The Rockefeller University, a leading research institution. He has been awarded 30 honorary degrees from such institutions as Princeton University, Northwestern, University of Michigan, Brown, NYU and University of Pennsylvania. He has received numerous awards for his work as a scientist and educator including the

National Medal of Science, the Franklin Medal, the Department of Defense Distinguished Service Award, the Nassau Distinguished Service Award and the American College of Physicians Edward R. Loveland Memorial Award.. He served two terms as president of the National Academy of Sciences and has been Chairman of the Board of the Sloan-Kettering Institute for Cancer Research.

**JAMES D. WILSON** is Senior Fellow at Resources for the Future. He holds a Ph.D. in organic chemistry. He has been a member of numerous scholarly organizations and panels, including the National Academy of Sciences Committee on Risk Characterization, the United States Environmental Protection Agency Peer Review Panel on "Carcinogen Risk Assessment Guidelines Revision," the United Nations FAO/WHO Joint Expert Committee on Food Additives. He is a Fellow of the Society for Risk Analysis.

**RICHARD WILSON** is Mallinckrodt Professor Emeritus of Physics at Harvard University and immediate past Director of the Regional Center for Global Environmental Change at Harvard University. He is an Affiliate of the Center for Science and International Affairs and the Center for Middle Eastern Studies at Harvard University. He is a past Chairman of the Department of Physics at Harvard University, a past chairman and currently a member of the Cyclotron Operating Committee. He is a founder of the Society for Risk Analysis. He is and has been a consultant to the United States government and the governments of numerous foreign countries on matters of nuclear safety, toxicology, epidemiology, public health and safety and risk assessment. He is the author of many articles on high energy physics, environmental pollution and risk analysis, including several articles with the Petitioner.

**CHARLES O. VELZY** is a consultant in the field of waste treatment and disposal. He has over 35 years of experience as an environmental engineering consultant specializing in the analysis of waste management problems, design of wastewater treatment and waste disposal systems and design of new, retrofit of existing, testing, and permitting of waste combustion facilities. He has authored or co-authored over 80 publications – primarily in the field of solid waste management. He has served on the Science Advisory Board of the U.S. Environmental Protection Agency. He is a past President of the American Society of Mechanical Engineers (ASME); and he was Treasurer of the American Academy of Environmental Engineers (AAEE). He has served on numerous committees of the ASME, the AAEE, the American National Standards Institute, and the American Society for Testing and Materials. He is a registered professional engineer in New York and eleven other states. Charles Velzy received B.S. degrees in Mechanical and Civil Engineering and an M.S. in Sanitary Engineering from the University of Illinois.

**ELIZABETH M. WHELAN** is President and Founder of the American Council on Science and Health. She holds a Masters degree in epidemiology and public health from the Yale School of Medicine and Harvard School of Public Health, and has a Doctoral degree in public health from Harvard. She is the author of more that 20 books about the environment, nutrition and human health.